and honorable business, which may be conducted in the open without fear of liability either civilly or criminally. So holds the Court of Appeals of Georgia. *Foster* v. *State,* 68 S. E. 739.

The disgrace of our criminal law is the network of technicalities which enable the manifest criminal to escape liability, and the delay with which the result is reached even when the guilty party does not escape; and these delays and uncertainties combine to deprive our criminal code of its proper restraining influence of the criminal, or protection to the public.

As a final word, applicable to the precise case above put, it is interesting to note that a possible hope of conviction is held out by such decisions as *Crum* v. *State,* 148 Ind. 47 N. E. 833, obtaining money by such a fraud is common law larceny; which is disregarding the rule that if the fraud induces the owner to part with possession only and the taker converts it, the offense is larceny, but if by means of the fraud the crook induces the owner to part with both possession and title to him it is obtaining by false pretenses.

J. R. R.

DUTY OF THE MORTGAGEE TO GIVE NOTICE AND PROOF OF LOSS UNDER STANDARD POLICY.—That the mortgagee is not bound to give notice and proof of loss under the standard insurance policy upon failure of the mortgagor to do so, was recently decided by the Appellate Division of New York State in *Heilbrun* v. *German Alliance Insurance Co. of New York,* 125 N. Y. Supp. 374.

Although the standard insurance policy was adopted by the legislature of New York in 1886, this is the first case in that state on the exact point in issue. Cases have arisen in a few jurisdictions, which have settled the point one way or the other, but in a great majority of the states the question is an open one.

This standard policy requires among other things notice and proof of loss to be rendered by the insured as a condition precedent to a recovery. Such conditions have been held to be reasonable by the courts, and compliance therewith must be affirmatively shown. *Am. Cereal Co.* v. *Western Assur. Co.,* 148 Fed. 77; *Columbia Ins. Co.* v. *Lawrence,* 10 Pet. 507, 9 L. Ed. p. 512; *O'Brien* v. *Com. Ins. Co.,* 63 N. Y. 108. That compliance does not have to be shown unless defendant pleads non-fulfillment, was held in *Adkins* v. *Globe Ins. Co.,* 45 W. Va. 384, 32 S. W. 194. West Virginia seems to be alone in this holding. The mortgagor is of course the proper person to give the notice and proof, but in case he fails there is some conflict as to the right of the mortgagee, and a greater conflict as to his duty, to do so in order to protect himself. The insured must comply, and manifestly this cannot be done by anyone else provided it is possible for him to do so. VANCE, INSURANCE, p. 504, 1 JOYCE, INSURANCE, § 3308. Compliance by the mortgagee will protect the interest of all. *Watertown Ins. Co.* v. *Grover Machine Co.,* 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146. See JOYCE, INSURANCE, § 3304 and cases cited. At present there is little doubt as to the right of the mortgagee to comply.

A further condition of the policy is to the effect that no act of the mortgagor shall invalidate the policy as to the mortgagee. The questions are: Is the mortgagee insured within the meaning of the policy as to notice and proof of loss by the insured, and does the condition as to non-invalidation apply to failure to give this notice and proof?

Authorities are pretty well in accord that the mortgage clause of a standard policy creates a distinct contract between the mortgagee and the insurance company. This contract the mortgagor cannot invalidate. *Queen Insurance Co.* v. *Dearborn Ass'n.*, 75 Ill. App. 371, affirmed 175 Ill. 115, one judge dissenting. Under this contract the mortgagee is given the right to demand payment for his loss and the right to sue for the same. He is given the benefits of the policy. Is he free from its burdens? In *Queen Ins. Co.* v. *Dearborn Ass'n.*, supra, it was held that notice and proof of loss need not be given by the mortgagee. This case was followed in *Northern Assurance Co.* v. *Chicago Bldg. Ass'n.*, 98 Ill. App. 152, 198 Ill. 474. Here, however, proof of loss by the owner had been waived by the insurer by his denying all liability under the policy because of a change in the ownership of the building. In *Dwelling House Ins. Co.* v. *Kan. etc. Trust Co.*, 5 Kan. App. 137, 48 Pac. 891, the mortgagee was held not bound to give notice, but in this case the policy contained two conditions which, if applied to the mortgagee, would have been inconsistent, hence the court concluded that they were not meant to be so applied. In *Glens Falls Ins. Co.* v. *Porter*, 44 Fla. 568, 33 South. 473, the court held that, while there was a separate independent contract with the mortgagee, there was a contract free from certain conditions of the mortgagor's contract, one of which was the requirement as to notice and proof of loss. In *Adams et al.* v. *Farmer's Mut. Fire Ins. Co.*, 115 Mo. App. 21, 90 S. W. 747, under facts very similar to the Northern Assurance case, supra, the court came to a similar conclusion, overruling, but entirely ignoring one of its former decisions to the contrary, *Lombard Investment Co.* v. *Dwelling House Ins. Co.*, 62 Mo. App. 315. In *Southern Home Ass'n.* v. *Home Ins. Co.*, 94 Ga. 167, it was held that the insurer was entitled to notice, and if not given by the mortgagor, then it must be by the mortgagee, if he would protect his interest. In *Union Institution for Savings* v. *Phoenix Ins. Co.*, 196 Mass. 230, 14 L. R. A. (N. S.) 459, the mortgagee did not know of the fire for some time, but the court held him bound to give notice within a reasonable time after he learned of the same, and of such matters *as the mortgagee might reasonably be expected to know.*

Courts deciding that notice need not be given by the mortgagee reason that it is as easy for the insurer to discover the loss as for the mortgagee, that the wording of the policy is such as not to require such notice by the mortgagee and that insurance contracts should be construed against the insurer. As to the first proposition, it should be comparatively easy for the mortgagee to discover his loss and report it. He knows what his own interest is, at least; he is a qualified owner and as such might be presumed to keep a closer inspection. Certainly at no time could it work a hardship or injustice to him to be required to give notice within reasonable time of such matters as he might reasonably be expected to know regarding his own loss. Does he

expect to be paid his interest on the policy without furnishing any proof of loss, or does he expect the company itself to furnish the proof, and then make the payment? Certainly the reasons which make it reasonable for the owner to make proof, apply as well to the mortgagee. The company is entitled to protection in either case.

The main support for these decisions, however, is not based on the question of facility of proof or reasonableness of the same, but rather on the somewhat indefinite phraseology of the policy. A consideration of the policy then is necessary, for if this policy does not require notice by the mortgagee, expressly or impliedly, equitable arguments on the subject are useless. The policy provides that no act of the mortgagor shall invalidate the policy as to the mortgagee. This clause refers to the acts or neglect of the mortgagor while the policy is subsisting, such as increase of risk, transfer of interest, etc.,—acts which are beyond the control of the mortgagee, and not to acts subsequent to the fire, provided by the company merely to furnish evidence of the loss. *Union Institution for Savings* v. *Phoenix Ins. Co.*, supra. The purpose of the clause is to protect the mortgagee when he could not protect himself; hence the intent of the clause should not be extended beyond the scope for which it was originated. The mortgagee cannot control conditions before the fire; he can after.

The conditions, as to proof of loss, etc., are stated in the policy subsequent to the expression that "conditions *heretofore* contained shall apply to the mortgagee." This is relied on by the majority as indicating that only those conditions stated before this expression should apply to the mortgagee. At best we are taking one expression out of its context and interpreting it without regard to the rest. It is elementary that a part of a contract should be construed with reference to the whole. Admitting, however, that this is the proper construction of the word "heretofore," is there anything stated, subsequently in the policy which imposes upon the mortgagee the duty of giving notice and proof? We find that the "insured" must give notice and proof of loss. By the terms of the policy, the interest of the mortgagee in the same is not to be terminated by any act of the mortgagor. In other words after the mortgagor shall have forfeited his own right to be insured, the very contract itself, provides that the mortgagee shall continue to be insured; hence is it not logical to say he is insured before any breach on the part of the mortgagor, and as such under the obligation of giving the notice imposed upon such "insured"? To the effect that the mortgagor is such insured, see *Stainer* v. *Royal Ins. Co.*, 13 Pa. Sup. Ct. 27; *Watertown Fire Ins. Co.* v. *Grover Machine Co.*, supra. Contra: *American Cereal Co.* v. *West Assur. Co.*, 148 Fed. 77.

LAUGHLIN, J., in his dissenting opinion seems to have arrived at the intention of the framers of the policy taken as a whole, by treating the question from a more comprehensive point of view than the majority. Undoubtedly, however, the opinion of the majority is in keeping with the rule of interpretation of contracts of insurance, most strongly against the insurer. Nevertheless the question readily presents itself, is it fair to so construe a contract which has been imposed upon the insurer by the legislature? As LAUGH-

LIN, J., points out, it is no more the company's contract than the individual's. In *Hamilton* v. *Royal Ins. Co.*, 156 N. Y. 327, 42 L. R. A. 485; the court held the interpretation of such policies (in this case as regards the statutory period of limitation) should not be taken strongly against the insurer, since the conditions are imposed by law and not by contract. This view seems particularly equitable since the statutes provide that no condition may be changed, altered, or added without permission.

Undoubtedly this decision of New York, the mother state of the standard policy, following as it does the rule in Illinois, Missouri, and Kansas will establish a precedent which will be influential in jurisdictions which have yet to pass on this proposition. F. J. S.